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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE CAPACITORS ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: DIRECT PURCHASER ACTIONS AND INDIRECT PURCHASER ACTIONS	CASE NO. 3:14-cv-03264-JD **MEMORANDUM OF SETTLING DEFENDANTS IN SUPPORT OF MOTIONS FOR PRELIMINARY APPROVAL OF SETTLEMENTS [DKT. NOS. 1298 AND 1305]** Hearing date: November 10, 2016 Hearing time: 10:00 a.m. Location: Courtroom 11, 19th Floor

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INTRODUCTION

Defendants Fujitsu Limited, NEC TOKIN Corporation, NEC TOKIN America, Inc., Nitsuko Electronics Corporation, Okaya Electric Industries Co., Ltd., Okaya Electric America, Inc., ROHM Co., Ltd., and ROHM Semiconductor U.S.A., LLC (collectively, "Settling Defendants") respectfully submit this memorandum to respond to the Court's concerns with Direct Purchaser Plaintiffs' ("DPPs") Motion for Preliminary Approval of Class Action Settlement with Defendants Fujitsu Limited, NEC TOKIN, Nitsuko, the Okaya Defendants, and ROHM [Dkt. No. 1298] and Indirect Purchaser Plaintiffs' ("IPPs") Motions for Preliminary Approval of Settlements and Notice Program with Defendants NEC TOKIN, Nitsuko, and Okaya [Dkt. Nos. 1305, 1306]. During the October 14, 2016 preliminary approval hearing [Dkt. No. 1350] and in a minute order entered on October 17, 2016 [Dkt. No. 1348], the Court questioned (1) whether the proposed notices would be adequate if class counsel do not clearly describe the attorneys' fees they will be seeking from the settlement funds, and (2) whether the releases in the parties' settlement agreements should be effective if class members do not receive actual notice of the class settlements or do not cash the checks sent to them when the settlement proceeds are distributed.

As to the first issue, Settling Defendants agree that class members should have clear notice of the extent to which the settlement funds may be diminished by the payment of attorneys' fees or other costs.

As to the second issue, Settling Defendants respectfully submit that the Court should not condition approval of settlements with 23(b)(3) classes on a revision of the settlement agreements to provide that only those class members who receive actual notice and compensation will release their claims. Rule 23 establishes a regime under which members of a 23(b)(3) class must receive "the best notice that is practicable under the circumstances," Fed. R. Civ. P. 23(c)(2)(B), and then must timely exclude themselves from the class if they do not wish to be bound, Fed. R. Civ. P. 23(c)(2)(B)(v)-(vii). The Ninth Circuit has expressly held that actual notice is not required before members of a 23(b)(3) class are bound. *See Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) ("We do not believe that [*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)] changes the traditional standard for class notice from 'best practicable' to 'actually received' notice. No Rule 23(b)(3) case has so

construed *Shutts*."); *see also Rannis v. Recchia*, 380 Fed. App'x 646, 650 (9th Cir. 2010) (class members whose notice was returned as undeliverable and never re-mailed received "the best notice practicable under the circumstances" because the administrator sent notice by first-class mail to their last known addresses and performed skip trace searches on notices returned as undeliverable). Requiring that members of a 23(b)(3) settlement class must cash their checks before being bound would impermissibly convert the "opt-out" process established by Rule 23(c)(2)(B) into an "opt-in" process. *See Ackal v. Centennial Beauregard Cellular L.L.C.*, 700 F.3d 212, 219 (5th Cir. 2012) (holding that it was an abuse of discretion to certify an opt-in class); *Kern v. Siemens Corp.*, 393 F.3d 120, 125 (2d Cir. 2004), *cert. denied*, 544 U.S. 1034 (2005); *see also Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 657 (1974) (noting that "the requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B)").

The Court may—indeed, must—scrutinize the proposed notice plans to determine whether they meet the requirement of being "the best notice that is practicable under the circumstances." But requiring the parties to modify their settlements to provide that class members' claims are not released unless they receive actual notice and cash a check would impermissibly convert Rule 23's "opt-out" process for 23(b)(3) class actions into an "opt-in" process, potentially lead to the "one-way intervention" problem the 1966 amendments to Rule 23 sought to eliminate, and discourage the settlement of 23(b)(3) class actions by making it much harder for the parties to predict how large the settlement class might be and therefore to agree on a settlement amount. Indeed, settling a 23(b)(3) class action on such an opt-in basis would require a settling defendant to accept the risk that it would pay substantial sums to a class, have only a small number of class members cash their checks, and then face a new class action brought by someone who did not cash his or her check on behalf of everyone else who did not cash their checks. Unless unclaimed funds reverted to the defendant (something that many courts understandably disfavor), the defendant could have paid out what it thought was a reasonable settlement amount, but still face basically the same exposure.

STATEMENT OF FACTS

On September 27, 2016, DPPs filed their motion for preliminary approval of settlements with the Fujitsu, NEC TOKIN, Nitsuko, Okaya, and ROHM defendants. [Dkt. No. 1298.] On October 6, 2016, IPPs filed their motions for preliminary approval of settlements with the NEC TOKIN, Nitsuko, and Okaya defendants and approval of notice program. [Dkt. Nos. 1305, 1306.] On October 14, 2016, the Court held a hearing on these motions. At the hearing, the Court stated that "If you didn't get paid, you don't give a release," Transcript of Proceedings held on 10/14/16 at 5:11–12 [Dkt. No. 1350], and that "the bottom line is if you can't show me that they got money, I'm not going to have them be released, okay." *Id*. at 7:9-11.

On October 17, 2016, the Court entered a minute order, which states in part, "[t]he release as currently worded seems too broad. The Court would prefer a release that makes clear that those class members who have not received notice of the settlement will not be deemed to have released any claims." [Dkt. No. 1348.] The Court set a second hearing on the motions for November 10, 2016, and ordered that papers relevant to the hearing be filed one week prior to the hearing. [Dkt. No. 1350 at 20:19–21:8.] On November 4, 2016, the Court granted a one-day extension of the filing deadline. [Dkt. No. 1370.]

ARGUMENT

I Neither Rule 23(b)(3) Nor Due Process Requires Actual Notice.

The Court's concerns about the potential for lack of actual notice and receipt of funds are understandable. But the Supreme Court and the Advisory Committee on Rules considered these issues when crafting Rule 23. It would have been easy enough to write Rule 23 to expressly require actual notice or to expressly require receipt of compensation before class members were bound. Rule 23 does neither. Instead, it specifies that notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). This language strikes a balance that preserves litigants' due process rights while encouraging the pursuit of claims that, in the absence of Rule 23(b)(3) class actions, would not be pursued given the size of individual recovery. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

Settling Defendants recognize that this Court has twice denied motions for preliminary approval in part because the releases would have extinguished claims for individuals who did not receive actual notice of the settlement or any payment. *See Stokes v. Interline Brands, Inc.*, No. 12-cv-05527-JD, 2014 WL 5826335, at *4 (N.D. Cal. Nov. 10, 2014) ("[T]he Court is very concerned about the intent to bind class members to the overbroad release even if they do not receive notice or a payment."); *Myles v. AlliedBarton Sec. Servs., LLC*, No. 12-cv-05761-JD, 2014 WL 6065602, at *3 (N.D. Cal. Nov. 12, 2014) (criticizing a "settlement [that] appears to extinguish the rights of all the putative class members, including those who do not get paid anything and may not even have received notice"). In both of those cases, however, the proposed releases sought to release Fair Labor Standards Act ("FLSA") claims, which as this Court recognized, "require an affirmative opt-in by written consent on the part of claimants, whereas Rule 23 . . . operates on an opt-out basis." *Stokes*, 2014 WL 5826335, at *4; *see also Myles*, 2014 WL 6065602, at *3. Further, the settlement in *Stokes* provided for the reversion of unclaimed settlement funds, 2014 WL 5826335, at *5, which exacerbates the impact of class members not receiving notice, not submitting claim forms, or not cashing checks.[1] The special requirements for releasing FLSA claims likely explain why this Court's decisions in *Stokes* and *Myles* did not cite or reference the Ninth Circuit's decisions in *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), and *Rannis v. Recchia*, 380 Fed. App'x 646 (9th Cir. 2010).

Silber arose from a 23(b)(3) securities class action and a class member who did not receive notice until after the deadline for opting out had passed. 18 F.3d at 1450. After learning about the class action, and before the settlement was approved and final judgment entered, the class member filed a motion with the district court requesting permission to opt out after the deadline. *Id.* at 1452. The district court denied the motion, approved the settlement, and entered final judgment. *Id.* The class member appealed, arguing that the notice procedures approved by the district court violated his due process rights and, in the alternative, that the district court abused its discretion in denying his motion to opt out late. *Id.* at 1451.

[1] The settlements proposed here do not provide for reversion of unclaimed settlement funds and the releases proposed here do not extend to FLSA claims.

The Ninth Circuit remanded the case for the district court to assess whether the notice procedure was the "best practicable" under the circumstances. *Silber v. Mabon*, 957 F.2d 697, 701–02 (9th Cir. 1992). After the district court found that the notice was the "best practicable," the Ninth Circuit reached the question of whether due process requires actual notice. *Silber*, 18 F.3d at 1451. Reviewing the question *de novo*, the court considered whether the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), "requires that notice actually be received in order to afford an absent class member the opportunity to opt out." *Id.* at 1453. Explaining that the Supreme Court defined the notice obligation in *Shutts* by reference to its earlier decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 174–75 (1974), neither of which imposed a requirement of actual notice to satisfy due process, the Ninth Circuit held: "We do not believe that *Shutts* changes the traditional standard for class notice from 'best practicable' to 'actually received' notice. No Rule 23(b)(3) case has so construed *Shutts.*" *Id.* at 1454. The court remanded the case for the district court to determine whether the class member should have been allowed to opt out late. *Id*. at 1455 (explaining that the court could not "conclude as a matter of law that there was no abuse of discretion" because the district court had failed to provide sufficient reasoning and to consider the appropriate factors).

In *Rannis*, an attorney who ran a credit repair company appealed the final approval of a settlement and the denial of his motion to decertify a 23(b)(3) class of twenty members on lack of numerosity grounds. Thirteen class members received notice and did not opt out. 380 Fed. App'x at 650. The notices sent by first-class mail to the last known addresses of seven other class members were returned as undeliverable and never re-mailed, but the class administrator did perform skip trace searches for those members. *Id.* Relying on *Silber*, and reviewing the due process issue *de novo*, the Ninth Circuit held that the seven members were properly included in the class. *Id*. ("[D]ue process requires reasonable effort to inform affected class members through individual notice, not receipt of individual notice.").[2]

[2] Other circuits agree that actual receipt of notice is not required by either due process or Rule 23. *See, e.g.*, *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 665 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (explaining that Rule 23 "recognizes it might be *impossible* to identify some class members for purposes of actual notice"); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir.

The facts in *Silber* and *Rannis* do not give rise to the same issues confronted by this Court in *Stokes* and *Myles*, or in two earlier Northern District of California cases cited in *Stokes* and *Myles*: *Lounibos v. Keypoint Government Solutions, Inc.*, No. 12-cv-00636-JST, 2013 WL 3752965, at *6 (N.D. Cal. July 12, 2013), and *Tijero v. Aaron Brothers*, No. C 10 01089 SBA, 2013 WL 60464, at *7–11 (N.D. Cal. Jan. 2, 2013). All of these cases concerned problematic settlements where deficiencies in the settlement (including the proposed release of FLSA claims) were amplified by the risk that class members might not receive notice. Like *Tijero* and *Lounibos*, *Stokes* and *Myles* cited *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999), for the proposition that absent class members must receive notice and an opportunity to opt out before being bound. *Ortiz* did not hold, however, that actual notice is required for 23(b)(3) classes. *See* 527 U.S. at 884.

Ortiz reversed the certification of a 23(b)(1) class, not a 23(b)(3) class. 527 U.S. at 830–31. Further, nowhere did the *Ortiz* Court say that actual notice is required, even for a 23(b)(1) class. The portion of the opinion cited by *Tijero*, *Lounibos*, *Stokes*, and *Myles* merely recounted and quoted the Court's earlier decision in *Shutts* for the propositions that before an absent class member's right of action can be extinguished, due process requires that the class member "'receive notice plus an opportunity to be heard and participate in the litigation,' and [ ] that 'at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class.'" *Ortiz*, 527 U.S. at 848 (quoting *Shutts*, 472 U.S. at 812). The *Ortiz* Court did not analyze, much less render a decision on whether due process for Rule 23(b)(3) class members necessitates actually receiving notice.

As for *Shutts*, the Court's discussion of notice arose in the context of its assessment of whether a state court could assert jurisdiction over and bind out-of-state absent class members who failed to opt out of a settlement. The Court held that the personal jurisdiction rules applicable to

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2012) ("Courts have consistently recognized that, even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice."); *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008) ("Due process does not . . . require *actual* notice to each party intended to be bound by the adjudication of a representative action."); *DeJulius v. New Eng. Health Care Emps. Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005) ("[D]ue process . . . does not require *actual* notice to each party intended to be bound by the adjudication of a representative action."). Other decisions in this District also recognize the rule. *See Moralez v. Whole Foods Mkt., Inc.*, 897 F. Supp. 2d 987, 1000 (N.D. Cal. 2012) (Breyer, J.) ("Due process does not require that a class member actually receive notice, so long as the notice afforded was 'the best notice practicable under the circumstances.'" (quoting *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992))).

defendants did not apply to absent class members, 472 U.S. at 808–12, and explicitly rejected the argument that class actions should be "opt in" because "[r]equiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit." *Id.* at 812–13. Most significant here, in between the two portions of the *Shutts* opinion quoted in *Ortiz*, the *Shutts* Court described the kind of notice that must be given to satisfy due process. It did not say that actual notice was required. Rather, it said: "The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15). Further, the Court held that "where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out,'" due process was satisfied, 472 U.S. at 812, but it did not reach the question of what might be required if the notice were not received because prospective class members whose notices were returned were excluded from the class, *id*. at 801, 812. Because *Shutts* did not hold that actual notice is required, *Ortiz*, which merely refers to *Shutts*, simply cannot be read for that proposition.

Stokes and *Myles* also rely on *Kakani v. Oracle Corp*., No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007), for the proposition that actual notice is required. But like *Ortiz*, *Kakani* did not hold that actual notice is required for 23(b)(3) class actions. In *Kakani*, the court held that notice by mail alone was not the "best practicable" for purposes of providing notice to class members still employed by the defendant and must be supplemented by "workplace notice, either by hard copy or e-mail." 2007 WL 1793774, at *10. The court also criticized the reliance, without more, on first-class mail to the last known address of former employees. *Id.* But the court stopped short of imposing a requirement of actual notice, saying instead that mail to the last known address "has not *yet* been shown to be good enough," and commenting that alternative forms of notice, such as publication or use of the internet, might need to be considered as supplemental notice. *Id*. (emphasis added). The court expressly acknowledged that "[s]ome caselaw allows mailed notice to be deemed adequate even when it is not delivered correctly but there must be a showing that the proposed address list is reasonably accurate. Otherwise, notice by publication may be necessary."

Id. at *10 n.5.[3]

Indeed, in cases where notice cannot be reasonably accomplished through direct contact, "courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process." *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 665 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016); *see Chao v. Aurora Loan Servs., LLC*, No. C 10-3118 SBA, 2014 WL 4421308, at *3 (N.D. Cal. Sept. 5, 2014) (granting preliminary approval of a class action settlement with a notice provision specifying that "[i]f, after the database searches and remailings described above, there are more than [a particular number of] members whose addresses and whereabouts remain unknown to the Claims Administrator, the Claims Administrator shall propose a publication notice procedure designed to reach as many such undeliverable class members as possible").

The releases in the proposed settlements here are comparable to those in settlements approved by judges in this district in similar nationwide antitrust class actions,[4] and Settling Defendants

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[3] In its denial of the motion for preliminary approval of settlement, the court in *Kakani* did suggest that many of the problems with the settlement could be solved by making the release effective against only those actually submitting claims. *Id.* at *11. This suggestion appears to have been predicated upon the fact that under the terms of the settlement, the defendant would have to pay only to the extent that class members actually filed claims and the fact that the release purported to extend to FLSA claims. *Id.* Thus, because of the way the settlement was structured, except for attorneys' fees and costs that defendant had already agreed to pay, the defendant's liability was dependent entirely upon whether class members filed claims at all. *Id.* at *1. If no claims were filed, the defendant could in theory be liable for $0 above costs and fees. The settlements in the present case do not touch upon FLSA and the amounts to be paid by the Settling Defendants do not change based on the magnitude of claims filed. There is no reversion in this case nor any incentive for Settling Defendants to reduce the number of claims made.

[4] *See, e.g.*, IPP Sony Settlement Agreement, *In re Lithium Ion Batteries Antitrust Litig.*, 4:13-md-02420-YGR (N.D. Cal.) [Dkt. No. 1209-1]; DPP Sony Settlement Agreement, *In re Lithium Ion Batteries Antitrust Litig.*, 4:13-md-02420-YGR (N.D. Cal.) [Dkt. No. 1090-1]; IPP Settlement Agreements, *In re Optical Disk Drive Prods. Antitrust Litig.*, 3:10-MD-02143-RS (N.D. Cal.) [Dkt. No. 1898-2]; DPP Settlement Agreements, *In re Optical Disk Drive Prods. Antitrust Litig.*, 3:10-MD-02143-RS (N.D. Cal.) [Dkt. No. 1758]; IPP Settlements, *In re Static Random Access Memory Antitrust Litig.*, 4:07-md-01819-CW (N.D. Cal.) [Dkt. Nos. 986-1, 986-2, 986-3, 986-4, 986-5, 986-6]; DPP Settlement Agreements, *In re Static Random Access Memory Antitrust Litig.*, 4:07-md-01819-CW (N.D. Cal.) [Dkt. No. 945-1]; IPP Settlement Agreements, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 4:02-md-01486-PJH (N.D. Cal.) [Dkt. Nos. 2135, 2136, 2136-1, 2136-4, 2137, 2137-1, 2137-2]; DPP Settlement Agreements, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 4:02-md-01486-PJH (N.D. Cal.) [Dkt. No. 2032]; IPP Settlement Agreements, *In re TFT-LCD Antitrust Litig.*, 3:07-md-01827-SI (N.D. Cal.) [Dkt. Nos. 6141-2, 6141-3, 6141-4]; DPP Settlement Agreements, *In re TFT-LCD Antitrust Litig.*, 3:07-md-01827-SI (N.D. Cal.) [Dkt. Nos. 3407-2, 3407-3, 3407-4, 3407-5, 3407-6, 3407-7, 3407-8, 3407-9]; DPP Settlement

respectfully suggest that the Court should not condition preliminary (or final) approval on the parties renegotiating their settlement agreements to make the releases conditional on class members receiving *actual* notice. Rather, the Court should scrutinize the proposed notice plans and the revised notices to be submitted by the plaintiffs to ensure that they afford absent class members "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

II Conditioning Releases on Cashing a Check Would Create an Impermissible Opt-In System, a "One-Way Intervention" Problem, and Discourage Settlement.

During the October 14 hearing, the Court stated that class members should not be deemed to have released their claims unless they actually cash their settlement checks. [Dkt. No. 1350 at 5:3–7:14.] Requiring that class members cash their checks before their claims are released would (1) create an impermissible opt-in system, (2) potentially cause one-way intervention problems, and (3) impede the settlement of 23(b)(3) class actions.

A. Opt-In Systems Are Not Permitted for Rule 23(b)(3) Classes.

Requiring the parties to rewrite their settlement agreements so that only those class members that receive and cash a check release their claims would effectively create an opt-in system. Class members would have to take an affirmative step (*i.e.*, cashing a check) to have their claims extinguished, even if they failed to opt out.[5] As explained above, in *Shutts*, the Supreme Court considered and rejected an opt-in approach. 472 U.S. at 812–13. Similarly, the drafters of Rule 23 considered whether Rule 23(b)(3) should involve an opt-out or opt-in procedure; they chose the former. *See* Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 394–96 (1967) (explaining that the opt-

Agreement, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 3:07-cv-05944-JST (N.D. Cal.) [Dkt. No. 2246-1].

[5] This would also create problems in entering final judgment. The final judgment could not be binding only on those class members who cashed their checks because that would render the entire opt-out process superfluous. And if the final judgment were to extinguish the claims of class members who did not cash their checks by operation of *res judicata*, the notices would need to accomplish the difficult task of conveying to class members the difference between affirmatively granting a release and losing the ability to pursue future claims by operation of *res judicata*.

out approach comports with due process and discussing the policy reasons for favoring the opt-out approach over an opt-in system).

Creating an opt-in system here would contravene Rule 23. Indeed, the Second and Fifth Circuits have held that a district court abuses its discretion by certifying a Rule 23(b)(3) opt-in class. *Ackal*, 700 F.3d at 219 ("[N]o authority exists under Rule 23 for certifying a class of this nature."); *Kern*, 393 F.3d at 125; *see also Clark*, 501 F.2d at 340 (noting that "the requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B)"). As the Second Circuit explained, "substantial legal authority supports the view that by adding the 'opt out' requirement to Rule 23 in the 1966 amendments, Congress *prohibited* 'opt in' provisions by implication." *Kern*, 393 F.3d at 124.

B. In Practice, an Opt-In System Would Likely Resurrect the "One-Way Intervention" Problem the 1966 Amendments to Rule 23 Were Intended to Solve.

If checks to class members are sent *after* final approval, class members who had not opted out could effectively do so simply by not cashing their checks. This raises the "one-way intervention" problem that the 1966 Amendments to Rule 23 were designed to solve. Former Rule 23 was exploited by class members so that they "could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 547 (1974). For example, "[i]f the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment." *Id.* This practice of one-way intervention "aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Id.* "The 1966 amendments [to Rule 23] were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id.*; *see also Schwarzschild v. Tse*, 69 F.3d 293, 296 (9th Cir. 1995), *cert. denied*, 517 U.S. 1121 (1996) (noting that "the history, purpose, and language of Rule 23(c)(2) indicate that it

only contemplates notification of the class before a final judgment has been rendered on the merits," but holding that under the facts of the case, defendant had waived the right to have class notice sent by moving for and obtaining summary judgment before class was certified and notified); *Villa v. S.F. Forty-Niners, Ltd.*, 104 F. Supp. 3d 1017, 1020–21 (N.D. Cal. 2015) (holding that plaintiffs' motion for partial summary judgment filed prior to class certification was procedurally improper on the basis that it violated the "one-way intervention" rule).

Conditioning a release on a putative class member actually depositing funds would also render superfluous the entire process of asking class members whether they wished to opt out of the settlement classes because it would effectively give them a second chance to do so. No such second bite at the apple is needed to protect settlement class members, particularly because "the use of the settlement class in some sense enhances plaintiffs' right to opt out." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litigation*, 55 F.3d 768, 792 (3d Cir.), *cert. denied sub nom. Gen. Motors Corp. v. French*, 116 S. Ct. 88 (1995). "Since the plaintiff is offered the opportunity to opt out of the class simultaneously with the opportunity to accept or reject the settlement offer, which is supposed to be accompanied by all information on settlement, the plaintiff knows exactly what result he or she sacrifices when opting out." *Id*. Thus, as long as the best notice practicable is provided, absent class members will be afforded the procedural protections required by Rule 23 and due process.

C. Conditioning Releases on the Cashing of Checks Would Impede Settlements of 23(b)(3) Class Actions.

There is a strong judicial policy in favor of settlement of class actions. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). That policy would be undermined by "allowing absent class members to easily escape the preclusive effect of settlement by claiming that they did not receive actual notice," *Pey v. Wachovia Mortg. Corp.*, No. 11-2922 SC, 2011 WL 5573894, at *7 (N.D. Cal. Nov. 15, 2011), or by not depositing their settlement proceeds. Were those arguments to be allowed, Settling Defendants would be discouraged from settling, or would offer less in settlement, because of the greater uncertainty in the size of the classes that would ultimately be bound by the settlements. Moreover, a requirement that class members cash their checks would

fundamentally change the economics of the settlements. As often occurs in class action settlements, defendants may be concerned about paying large sums to a class, only to discover that unexpectedly large numbers of class members opt out, thereby making the settlement economically unattractive. Indeed, unless a court were to approve a provision providing that any settlement funds remaining after the validity of the settlement checks expired were to revert to the defendant, if the majority of the class were to fail to cash their checks, a settling defendant could be exposed to the bulk of plaintiffs' claims despite having paid significant sums. This creates a significant disincentive for defendants to settle.

Courts have recognized that defendants have a strong interest in limiting late opt-outs. For example, in *In re Charles Schwab Corp. Securities Litigation*, No. C 08-01510 WHA, 2010 WL 4509718, at *1 (N.D. Cal. Nov. 1, 2010), the court considered a class member's argument that he had demonstrated "excusable neglect" sufficient to allow him to opt out after the deadline on the sole basis that he had not actually received notice. The court rejected this argument, recognizing that "if such excuses were deemed sufficient to warrant exclusion . . . defendants would be prejudiced, given their commitment to a settlement amount that was negotiated with a stable class membership in mind." *Id.*

Further, the value of any settlement could quickly be dwindled away by the high administrative expense of having to ensure that every potential class member received actual notice *and* opted in, in order to achieve the highest likelihood of finality. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 339 (3d Cir. 2011) (en banc) (Scirica, J., concurring), *cert. denied sub nom. Murray v. Sullivan*, 132 S. Ct. 1876 (2012) ("Collateral attack of settlements and parallel proceedings in multiple fora are common realities in modern class actions—features that can imperil the feasibility of settlements if defendants lack an effective way to protect bargained-for rights."). "A responsible and fair settlement serves the interests of both plaintiffs and defendants and furthers the aims of the class action device. Plaintiffs receive redress of their claimed injuries without the burden of litigating individually. Defendants receive finality." *Id.* But an actual-notice, opt-in system would give plaintiffs the sword of a collective action while denying defendants the shield of finality, distorting the current, well-established class action mechanism.

III The Court Must Scrutinize the Proposed Notice Plans, But Plaintiffs' Plans Are Robust and Comparable to Notice Plans Approved in Other 23(b)(3) Antitrust Class Actions.

Federal Rule of Civil Procedure 23(c)(2)(B) requires that the *content* of the proposed notice clearly communicate key information about the case and class members' rights and that the *process* of delivering notice provide "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The court must also "direct notice in a reasonable manner to all class members who would be bound by [a settlement]." Fed. R. Civ. P. 23(e)(1). With regard to the content of the notices proposed here, except for the issue of requests for attorneys' fees (which the DPPs and IPPs are working to correct), the long-form and short-form DPP and IPP notices adhere to the Court's Procedural Guidance for Class Action Settlements[6] and "clearly and concisely state in plain, easily understood language" the nature of the action, the class definition, class members' right to exclude themselves from the class, the time and manner for requesting exclusion, and the binding effect of a class judgment on members of the class as required by Rule 23(c)(2)(B). *See* DPP Saveri Decl. Ex. M at 1–2, 5–11 [Dkt. No. 1298-14]; DPP Saveri Decl. Ex. N. at 2 [Dkt. No. 1298-15]; IPP Mot. for Prelim. Appr. Ex. A at 1 [Dkt. No. 1306-2]; IPP Mot. for Prelim. Appr. Ex. B. at 1, 4–6 [Dkt. No. 1306-3].

With regard to the *process* of disseminating the notices, the notice procedures that class counsel intend to use are as, or even more, robust than the procedures used for other class settlements that were approved in this district. For example, the proposed media notice program for the IPP settlement includes advertising in national trade and consumer publications, "banner" ads on national trade publication websites, "banner" ads targeting consumers who are electronic hobbyists and enthusiasts, "banner" ads in a national e-newsletter targeted to the specific audience concerned, a custom email "blast" to opt-in subscribers of targeted publications, direct mail, and a news release disseminated via earned media. Young Decl. ¶¶ 10–16 [Dkt. No. 1308]. The scope of this proposed campaign is largely similar to the one approved for the indirect purchaser class in *In re Static Random Access Memory (SRAM) Antitrust Litigation.* *See* Gilardi Decl. ¶ 13, *In re Static Random*

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[6] *See* U.S. Dist. Ct. for the N. Dist. of Calif., Procedural Guidance for Class Action Settlements, *available at* http://www.cand.uscourts.gov/ClassActionSettlementGuidance.

Access Memory (SRAM) Antitrust Litig., 4:07-md-01819-CW (N.D. Cal. Apr. 15, 2010) [Dkt. No. 987]. And whereas notice in that case was directly mailed to only approximately 12,000 addresses, *id.* ¶ 13.c.i, the IPP notice procedure here entails mailing notices to approximately 150,000 potential class members, Young Decl. ¶ 15 [Dkt. No. 1308].

CONCLUSION

For the foregoing reasons, the Court should not require the parties to try to renegotiate their settlement agreements. It should instead scrutinize the proposed notices and plans for disseminating notice to ensure that they are "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Settling Defendants respectfully request that the Court grant the pending motions for preliminary approval after Plaintiffs submit their revised notices.

Dated: November 4, 2016

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Pursuant to Civil Local Rule 5.1(i)(3), I attest that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

Dated: November 4, 2016 /s/ *George A. Nicoud III*

CERTIFICATE OF SERVICE

I am employed in the San Francisco, State of California. I am over the age of eighteen years and not a party to this action. My business address is 555 Mission Street, San Francisco, California. On November 4, 2016, I served a copy of the below-listed document(s) described as:

MEMORANDUM OF SETTLING DEFENDANTS IN SUPPORT OF MOTIONS FOR PRELIMINARY APPROVAL OF SETTLEMENTS [DKT. NOS. 1298 AND 1305]

on the parties stated below, by the following means of service:

VIA U.S. MAIL	
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☑ **BY UNITED STATES MAIL**: I placed a true copy in a sealed envelope or package addressed to the persons as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Francisco, California.

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☑ **BY E-MAIL:** I caused the document(s) to be served electronically on the persons at the electronic notification addresses listed above.

Also served via email on counsel for all Defendants.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 4, 2016, at San Francisco, California.

/s/ Kevin Yeh
Kevin Yeh